United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1179

B
P/S

To be argued by
RAYMOND BERNHARD GRUNEWALD

United States Court of Appeals
For the Second Circuit

Docket No. 75-1179

UNITED STATES OF AMERICA,

Appellee,

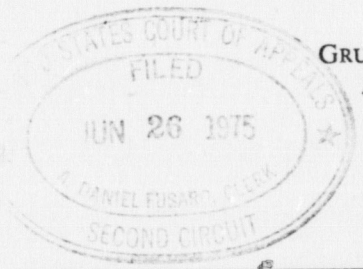
against

DOMINICK SANTIAGO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT



GRUNEWALD, TURK, GILLEN & FORD
Attorneys for Appellant
233 Broadway
New York, New York 10007
(212) 964-1400

INDEX

Cases Cited

Statutes Cited

Other Authorities

United States Court of Appeals

For the Second Circuit

Docket No. 75-1179

UNITED STATES OF AMERICA,

Appellee,

against

DOMINICK SANTIAGO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

Preliminary Statement

On July 25, 1973, the Grand Jury for the Eastern District of New York handed up indictment 73CR702, consisting of fourteen (14) counts, charging the appellant Dominick Santiago, a trustee and administrator of the Brotherhood Welfare Fund of Local 3108, AFL-CIO, along with Renee Simonofsky, a bookkeeper of the said union local, and one Kenneth Bellsey, a business agent of said union local, with violations of § 664, Title 18, U.S.C. (embezzlement, stealing and unlawful conversion to their own use and the use of the General Fund of said local, monies of the welfare fund), conspiring to do the same in violation of § 371, Title 18, U.S.C., violation of § 1027, Title 18,

U.S.C. (false statements in documents required by the Welfare and Pension Plans Disclosure Act), violation of § 501(c), Title 29, U.S.C. (embezzling, stealing and converting union funds to personal use) and violations of § 439(c), Title 29, U.S.C. (false entries in union records). (A. 10a-19a)*

On January 20, 1975, the defendant Bellsey's case was severed and trial began before the United States District Court for the Eastern District of New York (Platt, *J.*) and a jury. Counts 6, 8 and 12 were dismissed during the trial. On February 7, 1975, the jury acquitted the defendant Simonofsky as to all remaining Counts, acquitted appellant as to Count 1 (the conspiracy), Counts 2, 3, 13, and 14, but convicted appellant Santiago on Counts 4, 5, and 7 (violations of § 664, Title 18, U.S.C.), Counts 9 and 10 (violation of § 1027, Title 18, U.S.C.) and Count 11 (violation of § 501(c), Title 29, U.S.C.). (A. 5a, 8a-9a)

On April 11, 1975, appellant was sentenced: to five (5) years imprisonment on count 4 pursuant to § 3651, Title 18, U.S.C., to serve six (6) months, the balance of imprisonment suspended with four and one-half (4½) years' probation and a $500 fine; the same as to Counts 5 and 7, all to run concurrently, plus a $500 fine each; the same as to Counts 9, 10 and 11, also to run concurrently, plus a $3,000 fine respectively; the fines totaling $10,500. Execution of sentence was suspended and bail was continued pending appeal. On April 18, 1975, appellant Santiago filed a timely notice of appeal. (A. 87a)

---

* Reference Key: R—Trial minutes; A—Appellant's Appendix; GX—Government exhibit; DX—Appellant's exhibit.

Statement of Facts

During the years 1968, up and through 1971, the years primarily concerned in the indictment, Local 3108 was a labor organization and the appellant, Dominick Santiago, was its President. As such he was required to file and sign annual financial statements to the Secretary of Labor in accordance with Title 29, U.S.C. Appellant was also the administrator/employee-truste of the Brotherhood Welfare Fund of Local 3108 and was required to and did file reports in accordance with Title 29, U.S.C. (R.A28-A30; GX1)[1]

The government called 26 witnesses and the overall record encompasses some two thousand transcript pages.

The first witness called was Charles Middleton, an employee of the United States Department of Labor. (R.A33-B66) Mr. Middleton, as a custodian of records, introduced certified copies of Local 3108 annual welfare and pension plan reports for the fiscal year ending August 31, 1968 and August 31, 1969. He attested that the plan administrator, not the trustee, is responsible for the receipt, control and expenditure of the Welfare Plan funds. On direct examination he stated that if a Welfare Fund owed money to the union General Fund there was a place to report it on the forms that were filed with the United States Department of Labor. On cross-examination he admitted he did not know if it had to be reported. Santiago signed the report as a trustee. The form itself provided that the local, not the individual, was the trustee, despite the fact that this was not the intention as he understood it. (R.A41-A43; R.A47; R.B13; R.B53; R.B62; GX4; GX5).

---

[1] Initially, pages of the trial record are numbered with an "A" or "B" preceding the page number.

The next witness was one Bruce Inquanti. (R.B66-R.B72) He was an Assistant Manager of the European American Bank and Trust Company and identified signature cards for Local 3108 and for Local 3108 Welfare Funds which covered the period March 15th, 1968 through March 19, 1973. The authorized signatures on the Welfare Fund account were Leo Tabbe, Renee Simonofsky, Mildred Vernon and the appellant. (R.B66-R.B72; GX6). Next was a Michael Wolpert. (R.B72-R.B80) He was the director of the New York City office of the New York State Mediation Board. He testified that a Consent Award of Arbitration, dated June 12, 1969, had been awarded to Local 3108 with respect to a dispute involving Authority Trucking and Rental Corp. (R.B72-R.B80; GX8) The next witness was a James Boruck. (R.B80-R.B83; 1-35; R.280-R.292).[2] He was the general manager of Authority Trucking and Rental Corp. whose employees were represented by Local 3108. He testified that dues, initiation fees and the like were forwarded by the company to the union.

An arbitration award had determined that the company was in arrears for monies due to local 3108. He reviewed a series of checks payable to the union which carried various notations on them, some specifying "on account—Welfare Funds", others specifying "General Fund $60.00—Welfare Fund $200.00" and the like, the checks themselves containing written indications on them as to some sort of monetary breakdown as between dues and Welfare Fund payments. The union sent in billings for $25.00 a month for Welfare Fund payments. The company had been determined to be in arrears on welfare and dues payments as a result of an audit conducted by the appellant. He admitted that the union had held off collecting the money, in

---

[2] After page B83a, the record is just paginated numerically and starts at page *one*.

essence, to protect the jobs of the employees from what might have been a failing business. The company would sent in one check which covered all types of payments due. He identified the records of the Authority Trucking and Rental Corp. for the years 1964 through 1970. The entries in the company books reflected only that money was paid to the union without any breakdown as to whether it should be applied towards the Welfare Fund or the General Fund.[3] (TR. B80-83a; 1-35; 280-292; GX8).

Theodore M. Groder testified that he was the custodian of records for the American Express Company. (R.35-R.54) The company had issued to the appellant[4] two separate credit cards. One was a company account and a second, personal, card was a so-called "executive" credit card. He also identified a series of American Express receipts and charges. (R.35-R.54; GX13; GX14). The following witness was a Milton Chasin. (R.54-R.98) He operated the Bedford Bowl, a Bowling Alley, and his employees were represented by Local 3108. He forwarded the dues, welfare payments, etc. to the union. He identified a series of checks which bore a marking "A/C". Although the union had requested, *on their billings*, that separate checks be sent with respect to General Funds payments and Welfare Fund payments, nevertheless, as a matter of personal convenience, he only sent one check to cover both payments. He couldn't tell how much of any particular check was for the Welfare Fund or for the General Fund.[5] (R.84-R.88; R.93-R.97; GX15; GX19; GX19a).

---

[3] This testimony apparently related to Count 2, for which appellant stands acquitted.

[4] The appellant openly uses the name "Nicholas Sands" interchanged with "Dominick Santiago". For the purposes of this appeal the only reference will be to the latter name.

[5] This testimony apparently related to Count 3, for which appellant stands acquitted.

The next witness was one Sam Sartoiro. (R.104-R.113) He was a certified public accountant from the accounting firm of Savera and DiVittorio. They had handled the Caruso Food, Inc. accounts up to mid 1968. He attested that he had furnished work papers to the N.Y. State Dept. of Labor with respect to accounting performed at Caruso Foods. (R.106-R.107; R.109).

Martin I. Cohen testified that he was a certified public accountant and treasurer of Caruso Foods, Inc. during the years 1964 through 1970. (R.114-R.212) Local 3108 represented their employees and he received bills from the union with respect to payments due for welfare fund, dues, initiation fees, and the like. He identified a series of checks which had been made payable to the union. With respect to a check in the amount of $1,000, dated September 20, 1968 and one for $1,500, dated October 20, 1968, he didn't know if he had obliterated some writing on them. He attested that checks marked "Welfare" all went into the union Welfare Fund, and that checks marked "general fund" went into the union General Fund accounts. In fact, checks not specifically designated "welfare" went to the fund. (R.114; R.116; R.126; R.128; R.133; R.137-R.138; R.140; R.149; R.165-R.181; R.182-R.199; GX22-GX28).

The next witness was an Irving Milch. (R.213-R.246) He had operated a bowling alley, United Recreation Inc., during the years 1949-70. Local 3108 represented his employees during the years 1968 through 1970. He was billed monthly by the union and he sent but one check to cover everything, *i.e.*, welfare, dues, etc. The checks were for whole amounts and there was no written breakdown on them. (R.225-R.227; R.241; GX30-GX31).[6]

---

[6] His testimony and exhibits were later stricken from the record. (R.616-R.617) This testimony related to Count 6, dismissed during trial. (R.1615-R.1616).

James H. Frazier testified that he was formerly an accountant with the N.Y. State Dept. of Labor, Division of Labor Management Practices. (R.248-R.267 and R.511-R.565). He performed an audit of employers in connection with Local 3108. He examined the records of Green Acres and compared checks with work sheet schedules that he had prepared. Among the checks was a check for $808.00 which covered dues of $240.00, initiation fee, $25.00 and a Welfare Fund payment of $543.00. This check had been deposited in the General Fund.[7] After examining various checks and endorsements he ascertained that checks belonging in the General Fund were properly deposited there and that checks belonging in the Welfare Fund were properly deposited there. The *only* exception was government GX38, *i.e.*, the $808.00 check. He also had examined books of Caruso Foods Inc. and their accountant's work papers as well. As of December 31, 1967, the company's liability to the union was $11,112.00 of which $4,392.00 was for dues and initiation fees and $6,720.00 was for the Welfare Fund. By August of 1968 the dues had been reduced by some $2,000.00 in payments. He conceded that Local 3108 knew nothing about Caruso Foods adjusted book entries and were not responsible for them. He further stated that if an employer sent in a check, without designating as to which fund it should go, the union could decide where to deposit it. He also agreed that an employer could destroy a union by not making payments to the General Fund. This could be done simply by marking all the checks payable to the Welfare Fund. (R.248-R.249; R.254; R.256; R.512-R.513; R.515; R.517-R.519; R.542-R.543; R.524-R.525; R.533; R.535-R.536; R.549-R.550).

---

[7] This testimony was with respect to the charge in Count 5 of the indictment.

Sophie Wenzel testified that she was a bookkeeper for Bedford Bowl (R.309-R.323) She identified the records, cash disbursements, cash receipts, general ledger and the like. She also testified that there was no breakdown on the checks sent to the union with respect as to whether the money should go to the union's General Fund or the Welfare Fund. (R.293; R.299; R.303). Lillian Rocchio testified that she was a bookkeeper for Green Acres Bowl. (R.309-R.323) She also identified a series of checks and testified that checks made out to the Welfare Fund, went into the Welfare Fund and that checks made out to the General Fund went into the General Fund. She also testified that GX38, the check for $808.00, covered dues, Welfare Fund and initiation fees, according to the company ledger, and that this check had been deposited into the union General Fund account. (R.309-323; GX8; GX38; GX39; GX40; GX32A; GX32B; GX41; GX42; R.315-R.317; R.319).

Marie Prosnak was a former clerk for Local 3108 for some six to eight months during the year 1969. (R.324-R.420) She was apparently utilized to describe the union offices. Her description, initially, was that Mr. Santiago's office was furnished "luxuriously" and that his office occupied half of the total space available for the Local's headquarters. She was a part-time employee who did nothing but menial clerical work and answered the telephone. Her knowledge was extremely limited as to any union activities. She had, on some occasions, typed up some billings sent out to employers. On cross-examination she was vague about the physical description of the area she had worked in and couldn't remember simple details, such as whether the appellant's desk was wooden or metal, ornate or not. (R.325-R.333; R.340-R.341; R.343-R.344; R.347; R.349-R.353; R.355-R.356; R.356; R.361; R.366-R.367).

Harry Kurzer was a CPA who identified the general ledger for Caruso Foods for the years 1968 through 1971. (R.421-R.446) He identified the cash receipts books for 1968 through 1970, the sales journal for January 1968 to December 1970, and the cash disbursements book for January 1971 to December 1971. He testified he didn't know where the disbursement books for 1968 were. (R.422; R.425; R.431-R.434; R.442; R.447; GX45-GX47). Jack Jackson was an auctioneer. (R.448-R.456) He testified that certain records were destroyed and others were turned over to Mr. Kurzer. But he didn't know if the Caruso Food Corp. records were the ones that were actually destroyed. (R.450; R.453-R.455).

Sanford Gildenberg was a CPA who did accounting work for Caruso Foods covering the years 1968 through 1969. (R.456-R.480) Actually the work was commenced in June of 1969 and he operated from papers received from a predecessor accountant, one Tussa & Co. The original work papers of Tussa were sent back and he maintained photocopies. Work sheets were prepared for 1969. Dues, Welfare funds and initiation fees during 1969 involved some $11,760.00. (R.456-R.458; R.461; R.471; R.473; R.477). Julia Gampel testified that in 1971 she was a part-time employee of Local 3108. She was hired by the acquitted co-defendant, Rene Simms, and did gneral office work. She knew little or nothing about the operation of the union and was an uninformative witness. (TR.483-510) Billy E. Painter was an employee from the Justice Department's visual systems group, graphics. He apparently had to explain how certain government exhibits got marked up and the fact that he did it without realizing, in essence, that it was an original to be used in evidence. He introduced several so-called graphic blow-ups. (TR.565-581)

The next witness to testify was one Daniel Oppenheimer. (R.587-R.887) Presently a federal employee, he had been employed as a senior accountant for the New York State Department of Labor during the years 1964 through 1970. He made an audit of the books and records of Local 3108 at the union offices during November or December 1969 until March or April 1970. His examination was based on the annual report filed by the local for the year ending December 31, 1968. He extended his examinations into the 1967 and 1969 records as to cash receipts only. His examination did not encompass the Welfare Fund account. He explained the cash receipts books and the breakdown of the various entries into columns *i.e.*, dues, initiation fees, welfare exchange account, miscellaneous, etc. The cash receipts records reflected the fact that monies which were apportioned to the Welfare Fund were transferred to the Welfare Fund account. The Welfare Fund's exchange account balanced. (R.587-R.593;). Oppenheimer noted that GX38, a check in the amount of $808.00, dated August 9, 1968, from Green Acres Bowl had been deposited into the union's General Fund account, and had been recorded as dues and initiation fees with no portion going over to the Welfare Fund although the check itself reflected a breakdown of dues, initiation fees, and Welfare funds, the latter in the amount of $543.[8] (R.587-R.593; R.595-R.598; GX38; GX58;).

A letter, dated June 26, 1968, from a union attorney to Bedford Bowl on behalf of Local 3108 claimed that dues in the amount of $570.00, initiation fees in the amount of $700.00, and Welfare funds in the amount of $2,320.00, were due and owing to the union. The union claim, which totaled $3,590, was settled for $2,554. A letter from Milton Chassin, the owner of Bedford Bowl, to the appellant, listed a series of post-dated checks running from October

[8] Count 5.

1968 to April 1969, all in various sums, in payment of the settlement. These checks were all deposited in the General Fund account. The company books showed a breakdown according to dues, welfare funds, etc. None of these funds, all of which had been deposited in the General Fund account of Local 3108, were transferred to the Welfare account. Oppenheimer estimated that the minimum amount due to the Welfare Fund was $1,284.00. (R. 601; R.603-R.605; R.607-R.610; GX17; GX18).

Oppenheimer had also examined Authority Trucking and Rental Corp. books. He read into the record a New York State Consent Award, dated June 12, 1969. Appellant had audited the Welfare Funds at the company and the money was to be paid in until the default was satisfied. He stated that most of the checks received were deposited in the union's General Fund account and that there were notations on them "A/C". The appellant had audited Authority Trucking and did agree that payments were due the welfare plan. Oppenheimer testified from a half dozen chart analyses that were never introduced into evidence. He noted that most of the checks received from Authority Trucking were deposited into the union's General Fund account and that the union receipts records showed them as dues and initiation fees. (R.613; R.615-R.620; R.623).

Oppenheimer further testified that he had examined Caruso Foods Inc. books and records. He had initially examined them as an employee of the New York State Department of Labor and afterwards as an employee of the United States Department of Labor. He noted that of the checks payable to the Local, some were marked "A/C" and others were market "INIT". The Caruso Corp. records showed a breakdown as to initiation fees, dues, welfare funds, and the like. He stated that these checks, made payable to the union, were all deposited to the General Fund and that

there was no indication of a transfer of any portion to the Welfare Fund. However, he also stated that checks marked "Welfare Fund" were deposited in the Welfare Fund and that checks marked "Dues" were deposited in the General Fund. If the checks were part "welfare" and part "dues" the portion of the funds belonging to the Welfare Fund would be transferred to the Welfare Fund. He further noted that one check in the amount of $1,000.00, dated September 20, 1968 had the word "welfare" scratched out in ink with a red mark "A/C" on it and that another check in the amount of $1,500.00, dated October 20, 1968, had the word "welfare" similarly scratched out and it too was marked "A/C". These checks had been deposited into the General Fund account, whereas another check for $1,000, dated August 20, 1968, similarly marked "welfare", had been deposited in the Welfare Fund account.[9] The corporate books indicated that union dues which were payable as of December 31, 1967, totalled $1,119.00 and that the amount due to the union had been increased to $11,112.00 as an "adjusting entry" to reflect the total amount due by the end of the year 1968. This total figure included some $4,394.00 in dues and some $6,720.00 in Welfare Funds. The books reflected the fact that during 1968 the dues that were owed decreased $2,000.00, whereas, the Welfare Fund monies remained constant. (R.623-R.630; R.632; R.634; R.636; R.638-R.643; GX22).

Oppenheimer attested that unions are required to keep complete records. He had interviewed the co-defendant Rene Simms, and she had explained to him that *she* distributed the monies received by check according to a set procedure. She would check the monies received as against billings made to the various companies. She did not know about the Consent Award of June 12, 1969, and the Consent

---

[9] This testimony appears to have been in connection with Counts 13 and 14 for which appellant stands acquitted.

Award was not available to her at the time when she deposited the checks. She could not explain why the word "welfare" had been scratched out on two checks but she said that she did not do it. Using a summary chart, also not introduced into evidence, he stated that a total of $9,135.00 in welfare funds were deposited into the General Fund and not subsequently transferred to the Welfare Fund account. Oppenheimer had analyzed the bank statements for Local 3108 for the years 1968 and 1969 and noted that if the checks for the Welfare Fund were not placed into the General Fund, the General Fund account would have been overdrawn. Union checks had paid the American Express Company for some $710.64 which covered items such as an amount of $29.75 for the Harborview Hill in St. Thomas, Virgin Islands, and $172.00 was payable to one H. Stern and Co. at the same address. These had been paid out of General Funds on July 30, 1968. He also noted that there were bills for one Montreau Palace Hotel in Switzerland, in the amount of $200.49 and $61.64 which had also been paid out by the same check. These were bills that had been incurred by the union credit card issued to the appellant. There were other charges in small amounts which reflected the use of the card for what, in his opinion, appeared to be personal use. He stated that none of the expenses were authorized by any of the books or records that he had seen. (R.645-R.649; R.654-R.660; R.663-R.664; GX62; GX13; GX64).

Cross-examination revealed a number of inaccuracies in the witness' recollection and observations. He had overlooked an exchange check which showed that some $1,840.00, due to the Welfare Fund, actually had been transferred there. He admitted that "A/C" on a check could mean monies owed for dues as well as Welfare Funds. He admitted that he had *assumed* that the Caruso Foods Inc. books were correct and that the union's records were not

correct. He attested that he had made the same assumption as to all records. He never asked Caruso Foods Inc. why the "welfare" portion of monies due to the Welfare Fund was not put into a Welfare Fund check. He attested that the Caruso breakdown of funds given and the union breakdown of funds received didn't match. Yet he didn't find out why. He never made an attempt to find out who scratched out the words "welfare" on two of the checks in evidence. He simply *believed* that it was the union people who did this. He was of the opinion that money coming into the union should have been prorated rather than have the union determine where the funds should go. He attested that he had made a thorough examination of the union books and that they were no longer available. He had not made up any list of the exchange checks that went from the General Fund into the Welfare Fund for the years 1968-1969, or 1970. He admitted that there was nothing in the consent award of June 12, 1969 that specified how much money was for Welfare funds. The witness was placed in the position of contending that certain checks should have gone into the Welfare Fund based upon his examination of the Consent Award that took place some four months after the checks had been received. Rene Simms said that she did not mark over the words on the checks. (R.676-R.680; R.684-R.695; R.702-R.704; R.708-R.710; R.714; R.727-R.728; R.774; R.795; R.799; R.815-R.818; R.837; R.846-R.855).

Thomas E. Martin testified that he was an insurance examiner from the New York State Insurance Department. (R.888-R.957) He conducted a routine audit of the books and records of Local 3108 in 1969 and covered entries from the inception of the fund. A trust agreement, which he had received from the fund officials, had been in effect from 1963. Appellant Santiago was a continuing trustee. He stated that the trustee was required to keep accurate books

and records. Admittedly, Santiago was not the only trustee. Martin had copies of the minutes of certain meetings of the Welfare Fund starting with a meeting in October 6, 1967 up to December 19, 1968. He stated that the total income for the Welfare Fund for the fiscal year September 1967 through August 31, 1968 was $53,607.85 of which some $22,135.35 had been expended for benefits with general expenses of $19,966.08, for a total of some $42,101.43 expended. The annual rent and the utilities were paid by the Welfare Fund which was headquartered in the same offices as Local 3108. The rental was substantially reduced as a result of subletting portions of the space. It was also pointed out that the union owed appellant Santiago some $7,800.00 during the years 1968 and 1969. (R.888-R.889; R.894-R.902; R.926-R.930; R.938-R.939; R.944; GX67; GX68).

Edward J. Keenan testified that he was an employee of the United States Department of Labor and had served subpoenas upon the union for the production of the General Fund and Welfare Fund records. (R.957-R.960) Michael Pollack, a former special attorney for the Department of Justice, testified that these subpoenas had been returnable on June 21, 1971, that the appellant had called him and said that he would personally deliver the records on June 23rd but that on June 23rd Miss Simms had called and said that a Mr. Bellsey, who was supposed to drive a rented stationwagon loaded with all the records, had developed a serious back ailment and they were trying to get someone else. Some 15 minutes later the appellant called, said he was in Massachusetts, and also that Bellsey couldn't drive and that he was trying to get someone else. Pollack had told both appellant and Miss Simms that delivery by noon, or sometime thereafter, would be all right. He then stated that he received a telephone call from an attorney,

at approximately 3 o'clock in the same afternoon, and that he was advised that Santiago had told the attorney that the stationwagon and its contents had been stolen. (R.977-R.985; GX71; GX72). Santiago's grand jury testimony of June 30, 1971, was read into evidence. In essence, Santiago testified that the records were gotten together the night before and loaded into a rented stationwagon. Mr. Bellsey was to deliver the records the next morning, he called at midnight, was ill, they tried to get a replacement and apparently the car was stolen while it was parked overnight on the street. Santiago further testified that there were three other trustees, that the records had been previously examined by the government and that when the stationwagon was recovered by the police, it was empty. Rene Simms' testimony was also read. She, too, attested to the fact that the stationwagon had been stolen and that she didn't realize it was stolen until approximately 10:30 in the morning, and that she had thereafter told the appellant Santiago. It was noted that both appellant and Miss Simms voluntarily testified before the grand jury and that the car had been recovered by the New York City Police in the Bedford-Stuyvesant section of Brooklyn. (R.996-R.1036)

Kent R. Bellsey was next called as a witness. (R.1053-R.1150) Mr. Bellsey testified pursuant to a grant of immunity. He stated that he had been a business agent for Local 3108 for a period of approximately 9 months. In November or December of 1970 he had gone down to Washington, D.C. to try to organize S. Klein's Department Stores there. He had ben paid by 4 checks. One of the checks was drawn upon the union's General Fund, and three of the checks were drawn upon the Welfare Fund. On cross-examination, Bellsey testified that he had been indicted in the case and had received immunity afterwards. He stated that he in-

tended to go to trial because he believed he was innocent and that he had earned the money given to him by the union checks. He attested that he neither stole nor embezzled the money reflected by the checks with which he was paid, nor did he help anyone else do it. Bellsey had a business background and was a licensed insurance salesman and was paid by the Welfare Fund for advice given with respect to the Welfare Fund regarding policies and the best possible coverage for the money spent. He also serviced union members in this area. He worked for both the Welfare Fund and the union and was paid by both. He acknowledged that he had suffered excruciating pain with respect to his back the evening the station wagon and union records were stolen and had undergone emergency hospital treatment. He had told this to the government. He stated the records had been loaded into the automobile. He also stated that the appellant was in Washington on union business when Bellsey was there and that they were both furthering the interest of the Welfare plan. He said he had experience in the labor personnel field. He had no reason to question why he was paid with Welfare Fund checks. Approximately half his salary was paid out of Welfare Fund checks. He couldn't say exactly how much time he devoted to union business and how much to Welfare Fund business. (R.1053-R.1056; R.1058-R.1061; R.1063; R.1069-R.1079; R.1089-R.1093; R.1098-R.1099; R.1103-R.1110; R.1112; R.1126-R.1134).

Julia Gampel was recalled as a witness. (R.1156-R.1165). She stated that around June 21, 1971, she didn't observe any records being gathered nor did she see any cardboard boxes. She couldn't remember seeing any such boxes in the hallways of the union. She recalled that appellant had called her and asked her to see if the station wagon was still in front of the union offices. She admitted that she was

not employed at the union every day in June 1971 and that she left at 5 p.m. on those days on which she was employed. (R.1156-R.1158; R.1163-R.1164).

Seymour Blutstein was nex called. (R.1166-R.1189) He testified that he was the owner of Greenpoint Bowling and two to three employees were members of Local 3108 during the years 1968 through 1970. He testified that he became a Welfare Fund trustee in 1967 or 1968. He distinguished between two types of trustees, *i.e.,* one was representative of labor and one was representative of management. In Local 3108's Welfare Fund, there were two labor trustees and two management trustees. He recalled that appellant Santiago was one of the labor trustees but could not remember the names of any of the others. He attended several meetings in 1968 where others were present. Santiago presided at the meetings of the Welfare Fund. He couldn't recall how many meetings there were in 1969. He recalled there were discussions about expenditures and that expenditures had been made in behalf of the Welfare Fund. He also recalled discussions about obtaining an even better insurance plan which was to go into effect. Santiago didn't go over the list of expenses incurred or to be incurred; he simply submitted a list of expenses that had been incurred and obtained approval for these expenditures. He understood his duties as a trustee and had access to the union books and records. He recollected that a better hospitalization plan had been placed into effect and that Santiago answered whatever questions were posed concerning expenditures and explained them. The meetings were actually held at the union offices. People were employed by the Welfare Fund because they were needed and, accordingly, they were paid by the Welfare Fund. He recalled that the Welfare Fund paid Mr. Bellsey and Miss Simms. The trust agreement

provided for payments to employees of the trust fund. R.1166-R.1168; R.1170-R.1172; R.1175-R.1179; R.1183-R.1186; GX 67).

Leo E. Tavormina testified that he was the owner of the Melody Lanes Bowling Alley. (R.1189-R.1209) He was also known as Leo Tabbe. He was an employer-trustee of Local 3108's Welfare Fund. He had been asked by appellant Santiago to be a trustee. Meetings were held 4 times a year. He examined the disbursements and stated that he would question those which appeared to be large or subject to question. Sometimes only he and Santiago were present at the meetings. He testified that he signed checks in blank. He had signed the employee welfare and pension benefit plan's annual report as a trustee. The hospital plan was signed by the appellant as Administrator. R.1189-R.1190; R.1192-R.1195; R.1197-R.1199; GX4).

Raphael Siegel testified as a compliance officer, U.S. Department of Labor, who had previously worked as an insurance examiner with the New York State Insurance Dept., Welfare Fund Bureau. (R.1209-R.1511). Mr. Siegel was an accountant and while with the New York State Insurance Department, examined the Welfare Fund of Local 3108. He did so on June 24, 1971 and his examination covered fiscal year August 31, 1969 through August 31, 1970 and the period September 1, 1970 up to June 30, 1971. He examined all the books and records, including the annual filings of the fund, cancelled checks of employees and union monthly billings to employers. He stated that those employer contribution checks with notations on them that the funds were partly Welfare Fund, or all Welfare Fund, had been deposited into the General Fund account. He testified that his examination relied upon Mr. Oppenheimer's work papers. He found that some

checks had been changed by the union and paid to the Welfare Fund. However, he also noted that exchange checks were written and deposited into the Welfare Fund. In his analysis he stated that he used the checks of Authority Trucking, Caruso Foods, Green Acres and Bedford Bowl, plus the Oppenheimer work papers. He attested that some $1,284.00 of Welfare Fund receipts were deposited into the General Fund and exchange checks were not written. The court noted that the witness was extremely confusing.[10] The $1,284.00 of Welfare Fund monies which had been deposited into the General Fund was not reported on the Welfare Fund report for the period ending August 31, 1969. He characterized this as "under-reported." With respect to Authority Trucking Company he attested that some $2,148.00 in Welfare Fund monies had been deposited into the General Fund and exchange checks had not been written. He had examined the same checks as Mr. Oppenheimer and came to the same general conclusions except for the application of a portion of the checks. He attested that the Welfare Fund statement for the period ending August 31, 1969, with respect to Authority Trucking showed $140.00 "under-reported". He stated that Green Acres Bowl was under-stated by $540.00 and that the Caruso Foods were under-stated by $500.00. All of these monies were in the General Fund. The total "underreporting" with respect to Caruso Foods, Bedford Bowl and Authority Trucking for the 1969 period was $5,872.00. The D2 filing (Annual Financial Statement) for the Welfare Fund showed, in 1969, a total of $54,729.50 when it should have been $60,001.50. (R.1209-R.1211; R.1215-R.1217; R.1220-R.1222; R.1224; R.1229; R.1230-R.1231; R.1233; R.1235-R.1238; R.1241-R.1244; R.1246; R.1261; R.1247; R.1251; R.1254; R.1257; R.1260; R.1262-R.1270).

---

[10] R.1244; R.1246; R.1261.

Mr. Siegel testified that Local 3108 attempted to organize S. Klein's Store in Washington, D.C. and that a Mr. Bellsey was hired as a union organizer and business agent. Checks had been made out to Mr. Bellsey from both the Welfare Fund and the General Fund and for the period of time that he worked on this, Mr. Bellsey was paid some $586.00 more by the Welfare Fund than by the General Fund. He also attested to certain credit charges made for air flights between New York and Washington during the period of the S. Klein organizational activity and that these charges were signed by appellant Santiago. The total amount of money expended by Welfare Fund checks as to S. Klein was $1,298.58. Bellsey had been paid approximately $2,977.56 from the Welfare Fund and approximately $2,061.59 from the General Fund. Another employee, one Julia Gampel was paid some $2,140.29 and only out of welfare funds. An auditor for the Welfare Fund, and the union, had been paid out of Welfare Fund checks during the period of January 1971 through July 1971. Mr. Siegel testified that for the fiscal year ending August 31, 1969 expenditures totaled some $49,826.13, of which $23,128.03 was for insurance premiums and $26,698.10 was for general expenditures. During the period September 1, 1970 through June 30, 1970, some $78,357.85 was expended of which $33,147.36 was for insurance expenditures and $42,460.49 was for general expenditures. (R.1373-R.1375-R.1377-R.1384; R.1387-R.1390; R.1393-R.1394; R.1403-R.1405; R.1411; GX73; GX43a; GX75; GX74; GX43e).

On cross-examination it was apparent that the witness was being evasive and hostile. He admitted that he had used Oppenheimer's conclusory report and not his work papers. He didn't examine all of the checks; he contended that he examined only those that were made available. He admitted that all the checks were deposited in either

the General Fund or the Welfare Fund and that he really didn't know what Mr. Bellsey did, only that the Welfare Fund checks had been issued to him. He stated that Mr. Costa and Miss Gampel had told him that they had worked for *both* the Welfare Fund and the General Fund and he did not know what percentage they worked for each. With respect to checks previously testified to, in the amounts of $1,000.00 and $1,500.00, he could read the word "welfare," although it had been scratched over. He did not know who scratched it out. His inclusion of these checks as underpayment to the Welfare Fund was because, although made out to Local 3108, the checks had the scratched out word "welfare" on it, and even though he didn't know whether it had been scratched out by the union or the company. He also stated that the Authority Trucking company had gone out of business around January, of 1970 or 1971, and had owed the union some $11,333.33. He had made a number of errors in his report, such as overstating the amount allegedly understated by the union. The appellant Santiago never told him that he had instructed Rene Simms to deposit certain checks to certain accounts. Santiago had said that the reason he deposited the checks containing Welfare Funds into the General Fund account was because they contained General Funds as well, and because the General Fund needed the money at that time more than the Welfare Fund. At the time that he had conducted his examination he did not know if there had been exchange checks and it was only after he had seen Oppenheimer's workpapers that he learned that there were in fact, exchange checks from the General Fund to the Welfare Fund. Accordingly, he had to revise his estimates of understatement by the union, downward. Santiago told him that any monies that were owed to the Welfare Fund were eventually put back by exchange checks. (R.1429-R.1130; R.1435-R.1439; R.1441-R.1443;

R.1454-R.1476; R.1484; R.1486-R.1487; R.1489-R.1490; R.1504-R.1505).

The next witness was Donald Bunsis. (R.1515-R.1579) A certified public accountant, he had been hired as an accountant for Local 3108's Welfare Fund by appellant Santiago. He had been told his duties by Santiago, and they included the preparation of records, federal reports, tax returns, quarterly financial statements, etc. He did not audit the records of the Welfare Fund or the General Fund. He got the information to make the entries in the cash disbursements of the Welfare Fund from the checkbook stubs and the checks. Rene Simms made the entries and kept the checkbooks, cashbooks, etc. He did not verify the accuracy of the information used in preparing the labor management reports or the D-2 reports. He did not certify the quarterly statements since he was not engaged to do that. Conversations with respect to credit cards charges were mostly with Rene Simms. He felt that the credit card charges were high and that certain items should not have been charged to the Welfare Fund. Santiago had told him that the expenditures were all for union activity, no personal element was involved and if there were any mixups between the Welfare Fund and the General Funds they would be straightened out. Santiago said that he would correct Swissair charges for European travel and these charges were in fact corrected. Later there were other similar charges which he didn't notice or did not tell Santiago to correct. (R.1515-R.1524).

Santiago told Bunsis that Bellsey was working for both funds and would be paid one year by one fund and the next year by the other and eventually it would be worked out or something to that effect. However, on cross-examination he recalled, when shown checks, that Bellsey was paid from

both funds and that the government had not shown him these checks to refresh his recollection. He testified that an in-depth audit and certification would entail high accounting fees. Santiago had told him that it was a small local and had limited funds and couldn't afford large accounting fees. He had prepared all the reports to the federal and state government during the years 1966 through 1971. None were omitted. Santiago had gone to Switzerland to get treatment for his son who had muscular dystrophy and, later, died. (R.1525-R.1529; R.1531-R.1532; R.1534-R.1535).

He and Santiago had attended a compliance conference at the New York State Insurance Department on June 24, 1970. State officials made the contention that certain expenses were being paid out of the Welfare Fund that should have been paid out of the General Fund. Counsel for the N.Y. State Welfare Fund Bureau said that civil and criminal action would be taken if not corrected. Santiago agreed to correct it. A letter written by Santiago to the New York State Insurance Department attested that he would take certain corrective measures effective April 1, 1970 with respect to rent, auto and travel expenses. In another letter, dated July 7, 1970, Santiago stated to the same New York State officials that he would take other corrective measures as to rent, eliminate auto expenses with respect to the Welfare Fund, eliminate union activity expenses, and that the General Fund would repay the Welfare Fund for certain office expenses, which totalled $332.89 plus another $79.25 item. These letters and conversations were admitted in evidence over the objections of the defense. These agreements were a compromise with a New York State Agency. The New York State agency recognized that the Welfare Fund had to bear its portion of expenses. The witness said that Mr. Bellsey had told him that Santiago had said that since he was working for both funds and if one fund

paid him at one point, and another fund at another, it would even out over a period of time. Santiago had taken the position, at these conferences with the New York State officials, that these were legitimate expenditures. (R.1563-R.1566; R.1569; R.1572-R.1573; R.1575-R.1577).

Raphael Seigel was recalled. (R.1601-R.1614) He testified that he had reviewed Local 3108 books and records, including the disbursements from January 1971 through July of 1971. During the period October through May 1971, the Welfare Fund paid some $1,162.40 more in rent than the General Fund. During the period January 1, 1971 through July 31, 1971, the Welfare Fund paid $1,694.45 more than the General Fund. The Welfare Fund in addition paid other items such as postage, gas and electric, etc. The checks from the Welfare Fund were signed by Santiago and Tabbe. In addition some Welfare Fund money was utilized to pay for a union organizational expenses. However, it was conceded that the money was used only to pay actual bills and did not wind up in appellant Santiago's pockets. (R.601-R.614)

The defendant's called one witness. Nicholas Zennario testified that he was a bank manager for the Europen American Bank which was formerly the Franklin National Bank. Local 3108 had maintained accounts in the bank and he testified that a subpoena had been served on the bank, by the defendants, for books and records for the years 1968 through 1969. These records had been destroyed by water damage or were missing and could not be located despite efforts made in that regard. He further stated that the government did not seek the bank's records with respect to the union's bank statements, checks, and the like on microfilm. (R.1678-R.1691)

Questions Presented

1. Can the appellant be held *criminally* responsible, under the facts in this case, for: (a) clerical non-transfer of some Welfare Fund monies from the General Fund of the Union, where the initial co-mingling of funds was lawful and the fund were not converted to his own, personal, use?; (b) where the proof failed to show that the appellant, knew that totals of monies received as of a given date, in an annual report prepared by an accountant, were not accurate; and (c) where small items over a several year period, paid by the General Fund, appear to be of a personal nature and the General Fund, during the same period of time, owed appellant monies greatly in excess of these amounts?

2. Can evidence of compromise conversation and correspondence with State officials be lawfully utilized to prove "other offenses" showing the intent, knowledge and wilfullness on the issue of appellant's violation of federal statutes?

3. Is the trial court's charge to the jury plainly erronenous as to §§ 664 and 1027, Title 18, U.S.C. as charged in the indictment?

4. Under the *non*-organized crime, *non*-national criminal syndicate aspects of the instant case, did the "Special Attorney's" appearance before the grand jury constitute an unauthorized, unlawful appearance violative of the grand jury proceedings?

POINT I

Insufficient evidence, compounded by confusion and lack of clarity, cannot sustain a verdict beyond a reasonable doubt.

Appellant stands convicted of Counts 4, 5, 7, 9, 10 and 11. Counts 4, 5 and 7 charge violations of § 664, Title 18 U.S.C. Counts 9 and 10 charge violation of § 1027, Title 18 U.S.C. and Count 11 charges a violation of § 501(c), Title 29 U.S.C. The evidence is legally insufficient to support the jury verdict.[11]

A. Counts Brought Under 18 U.S.C. § 664.

Appellant is fully conscious of the admonition that, upon appeal, evidence and the inferences therefrom are viewed in a light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Nonetheless, it is most respectfully asserted that with respect to Counts 4, 5 and 7 there is *no* evidence in the record that the appellant embezzled or stole Welfare Fund monies, or unlawfully and wilfully converted any money or funds of the Welfare Fund monies, *to his own use*.[12] There

---

[11] Appellant's sufficiency of the evidence arguments include both statutory construction and review of the ruling submitting the evidence to the jury. In this latter regard appellant necessarily argues the Second Circuit standards set by *United States* v. *Feinberg*, 140 F. 2nd 592, 594 (2nd Cir.), *cert. denied*, 322 U.S. 726 (1944) which equates civil and criminal cases. But appellant also expressly requests the Court to overrule the much criticized *Feinberg* rule. *See generally*, Wright 2 *Federal Practice and Procedure* § 467 at 255 (1969).

[12] § 664, Title 18 U.S.C. provides, in pertinent part:

"Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be . . ."

are no claims of padded bills, no claims of unapproved personal expenditures with respect to the Welfare Fund. Unapproved expenses from the General Fund, in a small amount, were specifically charged in Count 11. Not a penny of the Welfare Fund monies was shown to have been siphoned off into appellant's pockets. The failure of proof in this regard is highlighted by the fact that Count 8, the only count which specifically charged that appellant did embezzle, steal and unlawfully and wilfully convert *to his own use* monies and funds of the Welfare Plan, without reference to doing it for "another", was dismissed for this reason on consent of the government during the course of trial. (R.1422) The arguments preceding the dismissal made it clear that a definite distinction had been drawn by the drafter's of the indictment between charging conversion "to his own use" and conversion "to the use of the General Fund". The distinction was that, as to the former, it was an allegation as to a conversion by the appellant actually to his own use *i.e.,* his own pockets, as distinguished from a conversion by the appellant to the general use of the General Fund which paid union day to day expenses. (R.1417-R.1422)[13]

Nevertheless, when motions to strike "to his own use" were made as to all the Welfare Fund Counts, *i.e.,* 2, 3, 4, 5 and 7, at the conclusion of the government's case, the motions were denied and the trial court permitted the Counts to go to the jury with both accusations lumped together. (R.1640; R.1654-R.1655) This ruling is addressed in appellant's Point III.

Absent proof of stealing, embezzling and conversion to appellant's own use, the question arises: is there proof of conversion "to the use of another"?

---

[13] Count eleven (11) used only "convert to his use", another clear distinction, and dealt with monies of the General Fund.

There is *no* substantial proof in the record that the General Fund of Local 3108 is "another" within the meaning of § 664,[14] Title 18 U.S.C. or within the meaning of a legal entity or person as accepted in law, *i.e.*, a corporation. (R.1628)

§ 664, Title 18, U.S.C. provides, in pertinent part:

> "Any *person* who embezzles, steals . . . or converts to his own use or to the use of *another* . . ." [Emphasis supplied]

It is respectfully submitted that "person" has a limited and recognized meaning in criminal statutes. And reference to "another" means *another person.*

As stated in Black's Law Dictionary, 4th Ed. at page 1300:

> "Persons are of two kinds, natural and artificial. A natural person is a human being. Artificial persons include a collection or succession of natural persons forming a corporation: a collection of property to which the law attributes the capacity of having rights and duties. The latter class of artificial persons is recognized only to a limited extent in our law. Examples are the estate of a bankrupt or deceased person. Hogan v. Greenfield, 58 Wyo. 13, 122 P.2d 850, 853.
>
> It has been held that when the word person is used in a legislative act, natural persons will be intended unless something appear in the context to show that it applies to artificial persons, Blair v. Worley, 1 Scam., Ill., 178; Appeal of Fox, 112 Pa. 337; 4 A.149; but as a rule corporations will be

[14] Only two cases are referred to in the U.S.C.A. case anotations under this section. Neither are of assistance on this point.

> considered persons within the statutes unless the intention of the legislature is manifestly to exclude them. Stribbling v. Bank, 5 Rand., Va., 132."

Examination of the legislative history of § 664, Title 18 U.S.C. reveals it to be devoid of any definition of "person" or "another" as contained therein. 1962 *U.S. Cong. & Adm. News* 1532, 1547.

Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. When a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before choosing harsher alternatives, to require that Congress should have spoken in language that is clear and definite. *United States* v. *Bass,* 404 U.S. 336, 347-348, 92 S.Ct. 515, 522 (1971). Here there is no Congressional indication that Congress intended to make "another person" equate to the General Fund of a union and to, in essence, make it a federal crime to co-mingle the same union's Welfare Funds with General Funds when the net result is that a portion of the former are used by the latter. In contradiction, when Congress has intended to enlarge upon common law embezzlement concepts to include conversion "to any other use or purpose", it has plainly said so. § 663, Title 18, U.S.C. See also § 1707, Title 18, U.S.C. ("Whoever steals, purloins, or embezzles any property used by the Postal Service, or appropriates such property to his own or any other than its proper use . . .). *Cf.* §§ 500, 1711, Title 18, U.S.C.

For all of the reasons elucidated, above, there is a total failure of proof of a violation of § 664, Title 18, U.S.C.

B. Counts Brought Under § 1027, Title 18 U.S.C.

Counts 9 and 10 charge that the appellant wilfully made a false statement, knowing it to be false, in the annual

report of the Welfare Fund for the fiscal years ending August 31, 1968 and August 31, 1969, respectively, by signing, as trustee, reports that stated that employee contributions to the Welfare Fund totaled $51,174.00 when they should have totaled $57,219.00, in the first instance and totaled $54,729.50 when they should have totaled $59,263.50, in the second instance.[15]

There is no proof in the record with respect to Counts 9 and 10 that Santiago prepared or supervised the preparation of the reporting forms, or that he mislead Mr. Bunsis, the accountant who actually prepared them from the union records, or that Santiago was knowingly responsible for a mathematical misrepresentation as to monies declared as total Welfare Fund monies received at the end of a fiscal year. The proof does show that the union received money and, by lawfully depositing checks payable to Local 3108 into the General Fund account, commingled some Welfare Fund money in the General Fund account; that the commingling was done by employees, not the appellant; that not all of the Welfare Fund money was transferred from the General Fund account and, that the bookkeeping with respect to checks deposited in the General Fund by employees and their correct identification as to distribution,

---

[15] § 1027, Title 18, U.S.C. provides:

"Whoever, in any document required by the Welfare and Pension Plans Disclosure Act (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such Act or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such Act to be published or any information required by such Act to be certified, shall be . . ."

was not always accurate and was, in some instances, inaccurate. But there was no proof that showed appellant *knew* or should have known that the totals on the reports were not mathematically reflective of the total Welfare Funds to be reported as received or that should have been reflected in the Welfare Fund at the close of a fiscal year. The accountant did the mathematics and appellant signed.

C. Counts Brought Under § 501(c), Title 29 U.S.C.

Count eleven charges that the appellant embezzled, stole, abstracted and converted to his own use $891.18 of the union's General Funds during January 1, 1968 up to December 31, 1970.[16] The proof consisted of a number of small items charged to appellant's union credit card, the exact amount being totally unclear from the record, which were paid for by the General Fund. While they "appeared" to be personal in nature, there is no proof in the record that the expenses incurred were not valid and/or ratified at a date subsequent to records disclosed at trial. There was evidence that the appellant, when the union accountant drew it to his attention, reimbursed the fund for foreign travel in behalf of his dying son. (R.1523-R.1524; R.1535). Furthermore, there was unrefuted evidence that the General Fund owed appellant $7,800.00, for the years, 1968 and 1969, and this was reflected in the annual reports in evidence. (R.944-R.945; GX3; DXA). This sum far exceeded any alleged improper charges. Reversal is required. *Cf. Rodgers* v. *United States,* 402 F.2d 830 (9th Cir. 1968).

---

[16] § 501(c), Title 29, U.S.C. provides:

> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be . . ."

D. The Proof in General.

The proof, when the trial is stripped of extraneous issues, is that the appellant was president of a union local and Administrator-Trustee of the Local's Welfare Plan; that employer checks made out to the union were properly deposited in either the General or Welfare Fund by bookkeepers or clerical employees; that some checks covered employer contributions for both the General Fund and the Welfare Fund, that some monies, perhaps 5-10% of the monies deposited in the General Fund, remained in the General Fund instead of being transferred over to the Welfare Fund; that Welfare Fund monies were sometimes utilized to pay what State officials characterized as General Fund expenses; that, on limited occasions, there were minor expenditures which appeared to be of a personal nature, charged to the General Fund which also owed appellant a sum 10 times greater; and, that the Welfare Fund was not tightly and, perhaps, efficiently run. The Local was, and is, a continuing organization and the trial is bereft of evidence that any effort was ever made by the *federal* government to require appellant to undertake the prompt exchange of funds from the General Fund to the Welfare Fund or to institute any change in operating procedures during any period prior to the indictment or even thereafter, or that any notice was given by federal officials that failure to do so would constitute a civil or criminal violation.

At this juncture, it is submitted that the words of Circuit Judge Edwards, speaking for the Sixth Circuit in *United States* v. *Swarthout*, 420 F. 2d 831, 833 (6th Cir. 1970) are appropriate:

> "Under our system of justice it is not enough that evidence in a criminal case might support a finding

> of unethical conduct or some other violation of some law. It is essential that there be evidence from which a jury could have found the defendant guilty beyond a reasonable doubt of the particular offense against the federal criminal law with which defendant has been charged''.

The weakness of the government's proof herein is exacerbated by its confusing nature. During argument on motions made at the conclusion of the government's case (R.1614-R.1673) the confusion that had reigned throughout the trial was summed up by the trial court:

> ''Had I prepared this case, I would have prepared schedules with Count references and introduced these schedules into evidence and then prepared blow-ups and so that you could show the jury what you're—but three pads of notes here that I have been maintaining and trying to keep track of everything that's been going on, it's been one maze for me and how this jury is going to understand, well, that is water over the dam because the defendants can do what they want with the lack of proof part of it . . .'' (R.1652-R.1653)

The government never ''tied-up'' the myriad bunches of checks and documents to each specific count. The jury never utilized any exhibits in their deliberations. (R.1908) The record does not support the monetary allegations made in the indictment.

In conclusion, on the record we find here the evidence is insufficient to support a verdict making appellant beyond reasonable doubt a *criminal* because of the manner in which the Welfare and General funds of Local 3108 interfaced.

POINT II

Admission of correspondence and conversation with N.Y. State Welfare Fund bureau officials was prejudicial error.

In letters dated April 1, 1970 and July 7, 1970 appellant had stated to N.Y. State Welfare Fund officials that he would undertake certain specified corrective action with regard to the use of Welfare Funds *vis a vis* General Funds. Conversation at a June 24, 1970 conference with these same officials, on the same subject matter, as well as the letters, were received in evidence, over objection. (R.1563-R.1566; R.1569; R.1572-R.1573; R.1575-R.1577). Initially, the Court acknowledged that such evidence would apply to the entire indictment (R.1550) but, in an interim instruction to the jury, modified its utilization at that juncture by specifying it was being admitted against appellant as to Count 1 (the conspiracy count as to which appellant was acquitted) which covered the time period 1 January 1968 up to July 1973, the time frame of all the other Counts in the indictment, and as to Count 7, which covered the time period December 1, 1970 up to July 1, 1971. (R.1563)

In the Court's view, appellant was on notice from July '70 that he faced possible civil and criminal penalties if he did not follow through, as represented. (R.1554) But the admonition as to possible civil or criminal sanction came from, and the appellant's representations of future compliance were made to, N.Y. State officials and only as to the N.Y. State official's interpretation of *State* regulations and appellant's response to them. (R.1563-R.1564) Yet this evidence was received specifically against appellant in the instant case on the issue of his knowledge, wilfulness or intent as to *federal* violations. (R.1562-R.1563)

There is no *proof* in the record that the same, identical requirements and compromise had been sought by federal officials or that, *if* federal officials had negotiated a compromise with appellant as to past and future conduct regarding Welfare Funds, that he would not or did not abide by it. The question thus arises: Under what concept of evidence can conversation and a compromise with a State agency, and representations made to them, be deemed proof of knowledge, wilfulness and intent to violate a federal statute by a continuing course of conduct frowned on by a separate and distinct sovereignty whose violations of law were and are protected by its own civil and criminal proceedings?

The effect of the acceptance of this evidence permeated the entire case. Hooked up to the Court's charge (R.1869-R.1872), it virtually assured appellant's conviction on those counts for which he was subsequently found guilty. The Court in its charge did not deliniate as between events that took place subsequent to the State compromises but stated that the jury could consider the evidence of what it termed an "alleged earlier or later *offense* of a like nature" as to any act charged in the indictment. (R.1869-R.1872)

The prejudicial effect of the introduction of conversations connected to and the compromises themselves (all of which, except as to Count 7, were subsequent to the charges for which appellant stands convicted) far outweighed any fair probative value. It had the practical effect of showing that the appellant had possibly committed acts, in violation of *State* civil or criminal sanction, subsequent to all but one of the crimes charged in the indictment, and from which the jury could infer that appellant had the propensity to

commit *all* the crimes charged.[17] See, *United States* v. *Smith*, 283 F.2d 760, 763 (2d Cir. 1960). The rationale thus expounded is that if a man is subsequently guilty of unlawful or immoral or civilly impermissable conduct on other, subsequent, occasions, why then there is an initial probability that he is guilty of what he is criminally charged with doing before. It is submitted that this type of evidence is inadmissable ". . . because it unduly confuses the decision of the issue on which the case must finally turn, and makes it likely that the jury may substitute the general moral obliguity of the accused." *Ibid.*

In conclusion, because the New York State Welfare Fund matters pertained to the regulatory scheme of another sovereignty, and as interpreted by that sovereignty, they are not "substantially relevant" to the instant federal charges on any theory of admissibility. *See, United States* v. *Bozza*, 365 F.2d 206, 212 (2d Cir. 1966); *United States* v. *Bradwell*, 388 F.2d 619, 622 (2d Cir. 1968). Moreover, whatever dubious probative value such evidence may have had was surely outweighed by the prejudicial impact. To repeat the oft quoted phrase ". . . its effect would be to generate heat instead of defusing light . . . , [A case] where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State* v. *Goebel*, 36 Wash. 2d 367, 379, 218 Pacific 2d. 300, 306 (1950); *United States* v. *Bozza, supra; Devore* v. *United States*, 368 F.2d 396, 398, Note 4 (9th Cir. 1966). The admission of this evidence, over objection, and especially in the government's case-in-chief, *See, McCormick, Evidence*, § 190 at 452 (Rev. Ed. 1972), amounted to an abuse of discretion.[18]

---

[17] Indeed, no jury or other judicial body has ever found that appellant's behavior constituted a New York State offense. Nor was the federal jury herein ever instructed as to New York Law. It was simply permitted to speculate on the evidence.

[18] A further factor in the balance favoring exclusion is the nature of the evidence constituting all compromise and settlement negotiations. See R.408, Rules of Evidence for United States Courts and Magistrates.

POINT III

The Court's charge contained plain error with respect to Counts alleging a violation of §§ 664 and 1027, Title 18 U.S.C.

When asked by counsel for the defense, during the trial, to consider whether the General Fund was "another", within the meaning of § 664, Title 18, U.S.C., the District Court retorted that while the Court of Appeals might disagree, there was no question in the District Court's mind that the General Fund was "another". (R.1628) It is the reasoned hope of appellant that the District Court's rationale was right in its thinking as to the former and wrong as to the latter.

Although the Court was asked to consider the question, in a record bereft of any evidence that the General Fund was "another", no evidence was ever required to be adduced which proved that the General Fund of Local 3108 was "another",[19] *i.e.*, another person, within the meaning of § 664, Title 18, U.S.C. And, as noted in appellant's Point I, at pp. 27-29, no definition of "another" or, for that matter, "person" is contained in the section or Chapter of the statute.

The Court, in its charge, quoted § 664, defined "plan" (R.1836; A.36a) and defined "embezzlement" (R.1840; A.40a). In defining the latter the Court stated, in part:

> ". . . it must be proven beyond a reasonable doubt that . . . (4) it is property of another (5) that the accused's dealing herewith constituted a fraudulent conversion or appropriation of the same to his or her own use, *or* to the use of *another*—in this case,

[19] The government did prove another essential element, by stipulation, that the Welfare Fund was subject to the Act. (R. 1836; A.36a)

> as you recall, in the statute—and (6) such was the intent to deprive the owner thereof." (R.1840-R.1841; A.40a-41a). [Emphahis supplied]

In defining "conversion" the court again referred to ". . . his or her own beneficial use or enjoyment or to that of a third person . . ." (R.1841; A.41a)

It is respectfully submitted that the Court committed plain error when it did not charge the jury on an essential element of the offenses charged in Counts 4, 5 and 7, namely, that they must find from proof in the record that the "General Fund" of Local 3108 was, in fact, "another" within the meaning of § 664, and that this had been proved beyond a reasonable doubt.

Furthermore, it is respectfully contended that the Court committed plain error in its overall charge as to the "essential elements" of a violation of § 664, Title 18, U.S.C., as charged in Counts 4, 5 and 7. (R.1855-R.1859; A.55a-59a) The jury was never instructed that a necessary element that the government was required to prove, beyond a reasonable doubt was the element: "*or* that the appellant converted Welfare Funds to the use of another." Instead, in what can only be characterized as a rambling, confusing charge, after neglecting to charge an essential element, as just noted above, the Court stated:

> "With respect to the language contained in the statute, 'to his own use,' or 'to the use of another,' you are instructed that the term, 'to his use,' or 'to the use of another,' does not require a showing that the money or property was appropriated to the personal use of the defendants; rather, it can mean that the money or property was used for purposes other than those purposes which the contributor intended it to be used for." (R.1857; A.57a)

The net effect of this charge is not only that the jury was not charged that the government had to prove "*or* conversion to the use of another" but that it was also told that the government need not prove conversion to the personal use of the appellant either! Instead, the jury was told that proof that money was used for purposes that the "contributor" (the employer) did not intend it to be used for, would suffice to convict, the latter not being an element at all.

To further compound the already aggravated situation, the trial judge went on to state:

> "Any breach of this fiduciary duty by the defendant Dominick Santiago where you find that he acted with fraudulent intent and without proper authorization or in a manner that did not benefit the Welfare Fund, then *you must find him guilty* of violating 18 U.S. Code Section 664, bearing in mind all that I have given you by way of instructions in this section." (R.1858; A.58a) [Emphasis supplied]

The net effect of this instruction, when the charge is viewed as a whole, is that the jury was told to find appellant guilty of a violation of § 664. It was not submitted to the jury as a permissable inference.

Finally, the court erred in failing, upon timely motion, to strike "to his own use" from the § 664 counts when the evidence failed to sustain that theory (*See*, Appellant's Point I, *supra*, at p. 27) and in submitting a case to the jury on the alternate theory that appellant converted Welfare Funds to his own use *or* to the use of another. The general verdict conceals whether the jury based its actual verdict on the former unsupported ground or on the latter arguably proper ground. Thus, this verdict should not stand because of the peril that appellant's

conviction be affirmed on a ground not relied upon by the jury. *See, Stromberg* v. *California,* 283 U.S. 359, 367-368 (1931). The court below permitted a false issue to nullify proper consideration of the actual dispute and appellant is entitled to a new trial before a jury properly instructed. *See, Michaud* v. *United States,* 350 F.2d 131, 133-134 (10th Cir. 1965).

As to Counts 9 and 10, the Court failed to charge essential elements of a violation of §1027, Title 18, U.S.C., as charged in the indictment, in that the jury was not told that, in order to convict, they had to find, beyond a reasonable doubt, that:

> (1) the annual report of the Welfare Fund, referred to in the indictment, was a " . . . document required by the Welfare & Pension Plans Disclosure Act . . . to be published or kept as part of the records of any employee welfare benefit plan . . . " etc.; and
>
> (2) that the false statement, as alleged in the indictment, was made by the appellant as to the employer contributions to the Welfare Fund as of the end of the fiscal year specified in the indictment, the amount understated being in an amount approximately as alleged.

From the charge as given with respect to Counts 9 and 10 (R.1859-R.1862; A.59a-A.62a) the jury could convict for *any* statement in the annual report they believed to be false, in any respect, and without determining solely from evidence before them that the amounts alleged to be, in effect, understated were, in fact, proven at least approximately in the amounts claimed to be understated.

Furthermore, the trial court removed from the jury's consideration their independent consideration of the issue

as to any reliance upon the part of the appellant on the figures arrived at by the accountant in his preparation of the figures for the annual reports which formed the basis of Counts 9 and 10. The Court stated:

> "Now, with respect to the accountant's testimony, Mr. Bunsis, you are instructed that reliance on the accountant, Donald Bunsis, who prepared the D-2 form, which is the annual report required to be filed with the Secretary of Labor, United States Department of Labor, and the subject of Counts 9 and 10, *is not a valid defense,* since the accountant testified that because he was given a limited assignment as to all of the records, it was not within his province to determine the factual accuracy of those reports." (R.1862; A.62a) [Emphasis supplied]

This effectively told the jury that the appellant's failure to require the accountant to perform an in-depth certification analysis of all the union's records required that they discard their own consideration of the evidence and, in effect, attribute knowledge of criminal error to the appellant. It was not submitted to the jury as a permissible inference.

Rule 52(b), Federal Rules of Criminal Procedure provides:

> (b) Plain Error. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Failure of the trial judge to instruct properly on every essential element of a crime charged constitutes plain error and requires reversal. *United States* v. *Small,* 472 F.2d 818, 819-820 (3d Cir. 1972); *Brown* v. *United States,* 277 F.2d 573 (5th Cir. 1960). Even withdrawal of requests to charge as to an essential element of an offense that was not

charged does not countermand prejudicial and plain error requiring reversal. *United States* v. *Ausmeier,* 152 F.2d 349 (2d Cir. 1945). And where the net effect of a judge's charge is to change the original accusation of the indictment, *i.e.,* in the instant case, instructing the jury that if Welfare Fund monies were used for purposes the contributor didn't intend, could constitute a basis to convict, is plain error. Federal Courts are without power to so alter or amend indictments. *Edgerton* v. *United States,* 143 F.2d 697 (9th Cir. 1944).

The comments of the trial court couched in the phrases ". . . you must find him guilty . . ." and ". . . is not a valid defense . . .", in the portions of the charge quoted above, constitute plain error. As stated in *United States* v. *Hines,* 256 F.2d 561, 564 (2d Cir. 1958):

> ". . . The charge as quoted appears therefore to have taken from the jury the exercise of a discretion solely within their province and to have assumed uncontestable proof of a vital element of the offense charged. . . . As we have often stressed, the charge must be viewed as a whole and parts should not be extracted for undue stress. Here it is probable that the judge planned only a comment on the evidence which the jury might find helpful, but not binding. But we are unable to discover in the remainder of the charge limiting language which would bring home to the jury their complete power to make or decline to make the inference in question. So we are constrained to hold that this was a basic error going to the heart of the case on the second count. Even though no objection was made to the charge, we believe the error vitiates the conviction on that count. There must be a reversal and remand for further proceedings in accordance with law as to this count."

POINT IV

The letter authorization of the "Special Attorney" under, the facts of the instant case, constituted an overbroad and sweeping commission which exceeded statutory authority in contravention of law. Therefor his presence in the grand jury in the instant case was not lawfully authorized and vitiated the validity of the proceedings.

Appellant filed a motion to dismiss the indictment against him on a date subsequent to the trial but prior to sentence. The motion, as amended at time of argument, was based upon the presence of an unauthorized person in the grand jury that returned the indictment. The unauthorized person was, a "Special Attorney" of the Organized Crime and Racketeering Section of the Department of Justice.[20] The Court refused to grant a hearing and denied the motion, relying on *United States* v. *Brown, et ano*, 389 F.Supp. 959 (S.D.N.Y. 1975).

It is clear, from the controversy engendered over the subject matter of this motion to dismiss,[21] as noted in *United States* v. *Williams*, No 74CR47-W-1, 16 CRL 2223, F.Supp. (W.D. Mo. 15 Nov. 1974)[22] that:

> ". . . the Special Attorneys . . . and their superiors in Washington had apparently given no more thought to the question of whether their power and authority

---

[20] See record of transcript for February 28, 1975.

[21] At the same time that the brief was given to the printer, the opinion in *In re Grand Jury Subpoena of Alphonse Persico*, — F.2d — (2d Cir. June 19, 1975), was published, thus limiting appellant's written response.

[22] The same District Court has reaffirmed its views in *United States* v. *Wrigley*, No. 74 CR 448-W-1, 16 CRL 2443, F.Supp. — (W.D. Mo. 5 February 1975). It is reported that the government declines to appeal.

> to act might be limited by applicable law than had government counsel involved in such case as *United States* v. *United States District Court,* 407 U.S. 297 (1972); *United States* v. *Giordano, supra,* and *United States* v. *Chavez,* 416 U.S. 562 (1974)."

Therefore, first at issue is, with respect to the instant case, the proper construction of § 515(a), Title 28, U.S.C., which controls the use of special prosecutors. That statute originates with the Act of June 30, 1906, 34 Stat. 816, and provides in full:

> "The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought."

United States v. *Crispino,* No 74-CR-932, 16 CRL 2503, — F.Supp. — (S.D.N.Y. 14 Feb. 1975 and March 24, 1975) followed up the import of the *Williams* opinion. In a carefully reasoned decision, Judge Werker dismissed the indictment in *Crispino* after an extensive review of the legislative background and history of § 515(a), Title 28, U.S.C. *Crispino* asserts that the letter authority of the "special attorney" in the *Crispino* case being too broad, since it appoints the "special attorney" to act in cases involving the violation of "federal criminal statutes", cannot be considered a "specific direction from the Attorney General" as required by statute.

In the instant case[23] there is no description in the special attorney's letter of authority or commission that he investigate "labor-management misfeasance" cases, or the "labor union locals" within the Eastern District of New York, or "union activity as it affected small industry" or some other such limiting authority. The commission letter does not really describe the *type* of cases that the special attorney was to present to grand juries. Under the commission letter the special attorney could prosecute any run of the mill crime, under any federal statute, including, but not limited to, offenses committed in violation of the Migratory Bird Act. The circumstances as to how he came to investigate appellant, what specific direction, if any, he received from the Attorney General, and why this was a case that had to be presented to a grand jury by a "special attorney", are unknown.

Analysis shows that § 515(a) expressly established two basic criteria for the proper authorization of special prosecutors conducting legal proceedings independently of the United States Attorney:

1. The special prosecutor must be an attorney "specially appointed by the Attorney General under law"; and

2. His assignment must be "specifically directed" by the Attorney General.

The greatest controversy has attended the construction of the term "specifically directed". *Compare United* v. *Williams,* No. 74 CR 47-W.1, 16 CRL 2223-2224, ——— F.Supp.———, (W.D. Mo. 21 Oct., 15 Nov., 3 Dec., 1974); *United States* v. *Crispino, supra, United States* v. *Wrigley,*

---

[23] A copy of the letter authority in the instant case is set forth in the appendix. (A. 21a)

No. 74 CR 448-W-1, 16 CRL 2443, ———F.Supp.———, (W.D. Mo. 1975) and *United States* v. *Dulski,* 17 CRL 2219, ———F.Supp.——— (E.D. Wisc. May 23, 1975), with *United States* v. *Brown,* 389 F.Supp. 959, (S.D.N.Y. 1975) and *In re Langelia,* ———F.Supp.———, (E.D.N.Y. Feb. 1975). The ambiguity may be resolved by reference to the House Report which shows that Congress intended the statute to allow the Attorney General's office "to have the benefit of the knowledge and learning" of special counsel needed "in the prosecution of *a special case,* either civil or criminal." H.R. Rep. No. 2901, 59th Cong., 1st Sess. 2 (1906). The report speaks in terms of having "the assistance of one who is specially or particularly qualified by reason of his peculiar knowledge and skill to properly present to the grand jury the questions *being considered* by it," that is, for use in a "particular case" or "special case". *Id.* The report in this vein emphasizes the bills purpose to overturn the 1903 decision in *United States* v. *Rosenthal,* 121 F. 862 (S.D.N.Y.) and to specifically authorize the former "practice of the Attorney General for many years to employ special counsel to assist district attorneys in the prosecution of suits *pending* in their respective districts whenever the public interest demanded it." *Id.* at 1. [Emphasis supplied]

It is against this background that the Attorney General's office nonetheless relies upon § 515(a), Title 28, U.S.C. to justify the usurpation of historic functions of the United States Attorney and the establishment of separate and permanent "field offices" of broadly powered and routinely operating "special prosecutors" accountable only to Washington. *United States* v. *Williams, supra,* (Nov. 15, 1974 order) at page 11 and note 7 of the slip opinion; *United States* v. *Wrigley, supra.* The appellant submits that no matter how desirable a national prosecut-

ing "strike force" may, or may not be, it is *not* authorized by the controlling 1906 statute. *Id.* This is particularly true in the instant case, a "*non*-organized crime" case.

The Court in *United States* v. *Brown,* 389 F.Supp. 959 (S.D.N.Y. 1975), apparently was just not fully informed of the pertinent history when it concluded that the requirement of the prosecutor's being "specifically" directed was relatively unimportant because of the omission of this stricture from the Senate version of the bill, *id.* at 961. Not only was S. 2969 withdrawn by the Senate in favor of H.R. 17714, the more stringent House version, 40 Cong. Rec. 9662, 9680 (1906), but also the only explanation in Senate debate concerning this action is the undisputed assertion that the House bill ". . . is much bette. than the Senate bill . . ." 40 Cong. Rec. 9662 (1906) (Remarks of Sen. Kean).

A chief difference between the bills just referred to, which are largely drafted in identical terms, is the clause in H.R. 17714 which permits a specially appointed attorney to conduct proceedings only ". . . when specifically directed by the Attorney General . . ." By basic principles of statutory construction this substitution of a more specific and demanding bill underscores the added House language and means that special prosecutors must indeed be "specifically directed". Moreover, this language must be double underscored since Congress rebuffed an attempt in 1945 to amend the statute for purposes of deleting the very clause in question. See *United States* v. *Crispino, supra,* at page 23 and n. 40 of the slip opinion.

Granted the importance of the "specifically directed" language emanating from the House Bill, how does the April 23, 1970 letter in question measure up? The first sentence retains and appoints ". . . to assist in the trial of the case or cases growing out of the *transactions* herein-

after mentioned . . .'' The next sentence ''specifically directs'' him ''[i]n that connection'' to do whatever United States Attorneys are authorized to do. Thus it is important to determine what these transactions are. The third paragraph declares that the Department of Justice is informed that unknown entities ''have violated in the above-named district and in other judicial districts the law'' contained in 16 named various statutory sections and furthermore have violated ''other criminal laws of the United States''. The sentence even further declares that the Department is informed the unknown entities ''have conspired to commit all such offenses in violation of Section 371 of Title 18 of the United States Code.'' In other words, the Department is aware that crime is afoot in the land, and these are the so-called ''transactions'' referred to. Yet *none* of these apply to the charges in the instant case. There is no ''special case'' or ''particular case'', no ''pending case'' and no ''questions being considered by'' a Grand Jury. In short, there is no specific direction.

It is respectfully submitted that *In re Grand Jury Subpoena of Alphonse Persico,* —— F.2d —— (2nd Cir. June 19, 1975) and the instant case are readily distinguishable and, in a sense, *Persico* supports appellant's position. The crimes for which appellant was charged, and those for which he stands convicted, are all mis-handling of funds, understatement of some fund receipts and one charge of using small amounts of union funds for personal items. It is not racketeering and certainly not ''organized crime'' activity by an organized crime figure. In *Persico,* Alphonse Persico was an ''organized crime'' figure and acknowledged his criminality pursuant to compulsion by a grant of immunity before a grand jury where he discussed his racketeering activities.

The linch-pin of the *Persico* opinion is the Court's acceptance of the overriding need to combat "organized crime" and the fact that the "Strike Forces" are "specifically directed" to that end, *i.e.* to combat as the Court phrased it, "national crime syndicates", the traditional organized crime "mob" personalities. Appellant does not come within the area of "specific direction" of the Attorney General as found by the Court in *Persico*. There is simply no evidence to that effect. The proof offered at the trial has nothing to do with the stated purposes of Strike Force prosecutions. It was a routine labor-management law violation case.

In construing the weight to be given to historical and leglislative background of statutes, this Circuit, in *United States* v. *Bernard Fein*, —— F.2d —— (2d Cir. 1974), found that such is paramount in determining the meaning of the printed words of Congressionally enacted statutes despite the damage that might ensue to those in government who relied on a prosecutional view subsequently found wanting.

It is respectfully argued that § 515(a), Title 28, U.S.C. was designed to supplement the Offices of the United States Attorney for the local districts, not to supersede circumvent, oversee or compete with them. It was and is a statute created for additional attorneys to act as to specific area of necessity not to act in general independence save to the Attorney General or someone he may have designated. Congress did not intend that the United States Attorneys and their assistants be supplanted, only that they could be supplemented, and even then, in limited, specified areas. It is not the lawfully intended use that is the subject of appellant's complaint but rather the congressionally unintended abuse. For all the reasons set forth above, on these grounds above, the conviction must be reversed and the indictment herein must be dismissed.

CONCLUSION

For all the reasons set forth, the judgment of conviction should be reversed and the indictment dismissed or, in the alternative, reversed and dismissed as to Counts 4, 5 and 7 and reversed and a new trial granted as to Counts 9, 10 and 11.

Respectfully submitted,

GRUNEWALD, TURK, GILLEN & FORD
Attorneys for Appellant
233 Broadway
New York, New York 10007
(212) 964-1400

Two (2)

Service of ~~three (3)~~ copies of the within
is hereby admitted

this day of

.....

Attorney(s) for